[redacted]

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Respectfully submitted,

[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. .....

SS SANTA ROSA, her engines, boilers, machinery, tackle, apparel and appurtenances, etc.
and
HAMBURG - SUDAMERIKANISCHE DAMPFSCHIFFAHRTS-GESELL-SCHAFT EGGERT & AMSINCK,

Petitioners,

v.

EDITH LOOMIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respectfully submitted,

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CONTENTS

Page

OPINIONS OF COURTS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

1. Conflict in Decisions of Courts of Appeal 5
2. The Decision of the Court of Appeals is Inconsistent with Prior Decisions of this Court 5

CONCLUSION 12

APPENDIX A 13

APPENDIX B 18

TABLE OF CASES

Page

City of Norwich, 118 U.S. 468 (1886) 7, 8, 9, 10

Consumers Import Co. vs. Kabushiki Kaisha Kawasaki Zosenjo, 320 U.S. 249 (1943) 8, 9

Continental Grain Co. vs. Barge FBL-585, 364 U.S. 19 (1960) 9, 10

MONROSA vs. Carbon Black Export, Inc., 359 U.S. 180 (1959) 4, 5, 10, 11

Schwartz v S.S. NASSAU, 345 F.2d 465, (1969) 6

Silvestri vs. Italia Societa per Azioni di Navigazione, 388 F.2d 11 (CA 2, 1968) 5, 11

STATUTES

28 U.S.C. § 1254(1) 2, 9

46 U.S.C.A. §§ 181-195 5-6

46 U.S.C.A. § 183b 2, 4, 5, 11

46 U.S.C.A. § 183 7

28 U.S.C. § 1404(a) 9

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Petitioners,

v.

EDITH LOOMIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on July 14, 1971, as to which rehearing was denied on September 24, 1971.

OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals has not yet been reported. It is printed herein as Appendix A. Order denying rehearing and modifying opinion is printed herein as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered July 14, 1971 (Appendix A). A timely petition for rehearing was filed July 27, 1971, and was denied September 24, 1971 (Appendix B). This petition for a writ of certiorari is filed less than ninety days after denial of the rehearing petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where a ticket for transportation incorporating § 4283A of the Revised Statutes (46 U.S.C.A. § 183b) provides that no suit may be instituted against the carrier after one year from the date of the injury, is such provision applicable only to an *in personam* action against the carrier, leaving the injured party free to proceed *in rem* against the vessel notwithstanding that such *in rem* proceeding was brought some twenty months after the accident?

STATEMENT OF THE CASE

Mrs. Edith Loomis, a citizen of Minnesota, brought this action for personal injury damages in federal district court, Western District of Washington, Northern Division. The action was *in rem* against the SS SANTA ROSA, her engines, boilers, machinery, tackle, apparel and appurtenances, and *in personam* against Hamburg-Sudamerikanische Dampfschiffahrts-Gesellschaft Eggert & Amsinck (Hamburg), the owner and operator of the defendant vessel.

The cause was tried to the district court without a jury and findings of fact and conclusions of law were entered which we summarize below: Mrs.

Loomis entered into a contract of carriage with Hamburg in 1965 for passenger transportation aboard the SS SANTA ROSA from the United States to Australia and return. When the vessel arrived at Auckland, New Zealand, en route, it moored along side a dock and a movable gangway was rigged for debarking passengers. On November 15, 1965, while proceeding along the gangway, Mrs. Loomis fell to the dock sustaining serious injury. She required surgery and other medical treatment, was totally disabled for a year, and has a permanent partial disability. The proximate cause of her injuries and damages was the negligent maintenance and unseaworthiness of the gangway. Mrs. Loomis' damages were found by the court to be $25,000.

Mrs. Loomis had obtained the ticket for transportation in September 1965. The copy of the ticket in evidence was not signed by Mrs. Loomis, but the court found that she had read her ticket and fully understood it. In paragraph 13 of the terms and conditions stated in the ticket, it is provided:

> "Notwithstanding any other limitation by law or that the Carrier may be a foreign corporation or non-resident, no suit shall be maintained against it in any jurisdiction nor shall the Carrier be liable, for damages for breach of this contract or for delay, loss or injury to or of any person or property or for death of any person, unless written notice of the claim is presented to the Carrier at its head office in New York City, N.Y., or the office of its agent at the place where the passenger is landed, not later than thirty (30) days after the claim arose and unless also suit is commenced not later than six (6) months after the claim arose; provided that in any case where Section 4283a of the revised statutes of the United States shall apply, the period for giving notice of, or

> filing claims for loss of life or bodily injury, shall be six (6) months and for the institution of suits on such claims shall be one (1) year, computed from the day when the death or injury occurred. The purchaser of this ticket, and his or her executors, administrators and dependents, agree to indemnify the Carrier from any losses or damages suffered by the Carrier by reason of any suit brought by any person in contravention of the terms of this paragraph."

Section 4283A of the Revised Statutes is codified as 46 U.S.C. § 183b, paragraph (a) of which makes it unlawful for the owner of a sea-going vessel to provide by contract or otherwise a shorter period for the institution of suits for loss of life or bodily injury, than one year, such period to be computed from the day when the death or injury occurred.

It is undisputed that Mrs. Loomis sustained her injuries on November 15, 1965 and did not file her complaint herein until July 11, 1967.

The District Court found that: "Plaintiff read said ticket in its entirety and fully understood the same," and that "Plaintiff's ticket constituted a contract of carriage . . ." The Court concluded that "Suit not having been brought within one year from the date of her injury as provided by the contract of carriage, plaintiff's cause of action is time-barred."

On appeal, Mrs. Loomis argued that the contractual provision in issue is wholly inapplicable to the *in rem* feature of her action and notwithstanding the fact that her *in personam* action is time-barred, she would be allowed recovery against the vessel.

The Court of Appeals held that paragraph 13 of the contract of carriage did not expressly apply to proceedings *in rem* against the vessel. In reliance on the *MONROSA vs. Carbon Black Export, Inc.*, 359 U.S. 180 (1959), the Court of Appeals reversed

the dismissal of the action as against the vessel and entered judgment in favor of Mrs. Loomis and against the vessel alone.

REASONS FOR GRANTING THE WRIT

1. Conflict in Decisions of Courts of Appeal.

There is a clear, express and embarrassing conflict between the decision of the Court of Appeals for the Ninth Circuit in this case and the decision of the Court of Appeals for the Second Circuit in *Silvestri vs. Italia Societa per Azioni di Navigazione,* 388 F.2d 11 (CA 2, 1968).

In *Silvestri,* the Second Circuit rejected the limiting construction urged by Mrs. Loomis. The Court there held that a time limitation clause which, by its terms, applied only to the company would be effective, if otherwise valid, to bar an *in rem* proceeding against the vessel. The Second Circuit held that the *MONROSA* doctrine relied upon by the Ninth Circuit was not applicable on several grounds, the Court stating:

> ". . . Here the language is different, and we can discern no intelligible purpose to be served by provisions for filing claims and starting suits that would apply only to *in personam* actions and leave the claimant free to attach the ship."
>
> *Silvestri vs. Italia Societa per Azioni di Navigazione,* 388 F.2d 11, 13 (CA 2, 1968)

2. The Decision of the Court of Appeals is Inconsistent with Prior Decisions of this Court.

(a) The contract of carriage in question was drafted incorporating the provisions of R.S. § 4283A (codified as 46 U.S.C.A. § 183b). This is one of the sections of the chapter of federal enactments dealing with vessel owners' liability. 46 U.S.C.A. §§ 181-

195. These statutes constitute a declaration of congressional policy. A recent decision of the Second Circuit involving a ticket constituting a contract of carriage stated:

> "Section 4283A applies generally to all personal injury and wrongful death cases in which 'the manager, agent, master or owner of any sea-going vessel *** transporting passengers or merchandise or property from or between ports of the United States and foreign ports' has provided 'by rule, contract, regulation, or otherwise' a time period within which a claimant must give notice or bring suit. The statute is one 'of general import, enacted for the purpose of regulating the relationship between a common carrier *** and passengers with reference to duties, obligations and restrictions of the carrier in connection with its issuance of tickets and its liability to passengers for safe passage thereunder.' Moore v. American Scantic Line, Inc., 30 F.Supp.843, 845 (S.D.N.Y. 1939), aff'd, 121 F.2d 767 (2d Cir. 1941); accord, Scheibel v. Agwilines, Inc., 156 F.2d 636, 638 (2d Cir. 1946), and is applicable in state as well as federal courts, see Ayoub v. Moore-McCormack Lines, Inc., 17 Misc.2d 519, 191 N.Y.S.2d 411 (App. T. 1958); Glusman v. United States Lines Co., 39 Misc.2d 845, 241 N.Y.S.2d 960 (Sup. Ct. 1963).
>
> "The purpose of the statute of which Section 4283A is a part, 'was to encourage shipbuilding and [its provisions] *** should be liberally construed in the ship-owner's favor.' Section 4283A 'is not *** an isolated enactment whose negative language should be narrowly construed, but is a declaration of Congressional Policy as to lawful contractual time limitations ***'. Scheibel v. Agwilines, Inc., supra, 156 F.2d at 632."
>
> *Schwartz v. S.S. NASSAU,* 345 F.2d 465, 467 (1965) Certiorari denied 86 Supreme Court 294, 382 US 919, 15 L.ed 2d 234.

(b) This Court has interpreted other sections of this chapter involving vessel owners' liability consistently since *City of Norwich,* 118 U.S. 468 (1886).

In *City of Norwich,* the section under consideration was R.S. § 4283 (46 U.S.C.A. § 183), which reads in part:

> "The liability of the *owner* of any vessel whether American or foreign . . ."

In that case, argument was made that this section did not cover an *in rem* proceeding. That argument was answered by the Supreme Court stating:

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated, unless where, for public reasons, the law exempts particular kinds of property from seizure, such as the tools of a mechanic, the homestead of a family, etc. His property is what those who deal with him rely on for the fulfillment of his obligations. Personal arrest and restraint, when resorted to, are merely means of getting at his property. Certain parts of his property may become solely and exclusively liable for certain demands, as a ship bound in bottomry, or subject to seizure for contraband cargo or illegal trade; and it may even be called "the guilty thing"; but the liability of the thing is so exactly the owner's liability that a discharge or pardon extended to him will operate as a release of his property. It is true, that in *United States* v. *Mason,* 6 Bissell, 350, it was held that in a proceeding *in rem* for a forfeiture of goods, the owner might be compelled to testify, because the suit is not against him but against the goods. That decision, however, was disapproved by this court in the case of *Boyd* v. *United States,* 116 U.S. 616, 637 [Bk. 29, L.ed.

746, 753], in which it is said: "Nor can we assent to the proposition that the proceeding [*in rem*] is not in effect a proceeding against the owner of the property as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited. In the words of a great judge, 'Goods, as goods, cannot offend, forfeit, unlade, pay duties or the like, but men whose goods they are.' " Vaughan, *C. J.*, in *Sheppard* v. Gosnold, Vaugh. 159, 172, approved by *Ch. Baron* Parker in *Mitchell* v. *Torup,* Parker, 227, 236.

But the argument is at war with the spirit as well as the text of our decisions on the subject of limited liability. The case of *The Benefactor,* 102 U.S. 214; *S.C.* 103 U.S. 239 [Bk. 26, L.ed. 157, 351, 466], is precisely in point. That was a case of libel *in rem* against the vessel in fault, and the proceeding for a limited liability was sustained. It is true that this particular point was not raised; but the parties in the case were represented by able and experienced counsel, and the point would certainly have been raised if they had regard it as tenable."

City of Norwich, 118 U.S. 468, 503, 504 (1886)

In *Consumers Import Co. vs. Kabushiki Kaisha Kawasaki Zosenjo,* 320 U.S. 249 (1943), this Court was considering the so-called fire statue, R.S. § 4282 (46 U.S.C.A. § 182). That statute reads in part:

"No owner of any vessel shall be liable . . ."

The Supreme Court granted certiorari to resolve the question, "Does the fire statute extinguish maritime liens for cargo damage or is its operation confined to *in personam* liability only?" The Court decided that question, citing with approval the *City of Norwich,* stating:

"The provision here in controversy is § 1 of the Act of March 3, 1851. Despite its all but a cen-

tury of existence, the contention here made has never been before this Court. Sections 3 and 4 of the same Act in other circumstances provided limitations of liability, and as to them a question was considered by this court in The City of Norwich (Place v. Norwich & N.Y. Transp. Co.) 118 US 468, 502, 30 L ed 134, 146, 6 S Ct 1150 (1886), stated thus: "It is next contended that the act of Congress does not extend to the exoneration of the ship, but only exonerates the owners by a surrender of the ship and freight, and, therefore, that the plea of limited liability cannot be received in a proceeding *in rem." The Court rejected the contention and held that when the owner satisfied the limited obligation fixed on him by statute, owner and vessel were both discharged. The Court said that "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles." The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age."

Consumers Import Co. vs. Kabushiki Kaisha Kawasaki Zosenjo, 320 U.S. 249, 252, 253 (1943)

(c) Still later, in *Continental Grain Company vs. Barge FBL-585*, 364 U.S. 19 (1960), a case involving motion under 28 U.S.C. § 1404(a) for transfer of an action, this Court had occasion to again review and reassert its holding in the *City of Norwich*. In that case, the Court spoke of the long-standing admiralty fiction that a vessel may be assumed to be a person, stating:

This Court has not hesitated in the past to refuse to apply this same admiralty fiction in a way that would cut *down, as it would here, the scope of congressional enactments. In fact, Mr. Justice Bradley, speaking for the Court, said at one time, in construing a statute which had lim-

ited a shipowner's liability but had failed to refer to the "personal" liability of the vessel:

"To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of the property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated . . . ." The City of Norwich (Place v Norwich & N.Y. Transp. Co.) 118 US 468, 503, 30 L ed 134, 147, 6 S Ct 1150.

Fifty-seven years later this Court was confronted with a similar argument about another section of the same statute, and after referring to the analysis in The City of Norwich concluded,

"The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age . . . . Congress has said that the owner shall not 'answer for' this loss in question. Claimant says this means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property.' Consumers Import Co. v Kabushiki Kaisha Kawasaki Zosenjo, 320 US 249, 253, 254, 88 L ed 30, 33, 34, 64 S Ct 15."

Continental Grain Company vs. Barge FBL-585, 364 U.S. 19, 23, 24 (1960)

(d) The case of the *MONROSA vs. Carbon Black Export, Inc.,* 359 U.S. 180 (1959), had occasion to consider the *City of Norwich* doctrine where federal statute was involved. In the instant case, federal statute is involved in that the contract of carriage in paragraph 13 incorporated as a part § 4283A of

the Revised Statutes of the United States (46 U.S.C.A. § 183b), thus making applicable the statement in *MONROSA*:

> ". . . Considerations involved in construing exemptions from carriers' liability provided by Acts of Congress are, we think, quite different. See Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, 320 US 249, 88 L ed 30, 64 S Ct 15. It is a form contract, not a statute, that we construe here."
>
> *MONROSA vs. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959)

It is likewise important, in considering the *MONROSA* case, to review it in the same light as the Second Circuit, in *Silvestri*. The *Silvestri* Court stated:

> "Finally, the clause *sub judice* in *The Monrosa* encountered what the Fifth Circuit had characterized as "one of the most universally recognized rules of law," namely, that "which gives the right to libelant, possessing a maritime lien against a vessel, to proceed in rem in the jurisdiction where the vessel is found," 254 F.2d 297, 300 (5 Cir. 1958), quoting Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S, 239 F.2d 463, 467 (5 Cir. 1957), and the Supreme Court also recognized this by its reference to The Maggie Hammond, 76 U.S. (9 Wall.) 435, 449, 450, 19 L.Ed. 772 (1869), which held that liens "will generally, although not universally, be respected and enforced in all places where the property is found or where the right can be beneficially enforced by the lex fori." See also Continental Grain Co. v. FBL-585, 364 U.S. 19, 21—27, 80 S.Ct. 1470, 4 L.Ed.2d 1540 (1960)."
>
> *Silvestri vs. Italia Societa per Azioni di Navigazione,* 388 F.2d 11, 13 (CA 2, 1968)

CONCLUSION

For the foregoing reasons, petitioners pray that this petition for writ of certiorari be granted.

Respectfully submitted,
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Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDITH LOOMIS, *Appellant,* vs. SS SANTA ROSA, her engines, boilers, machinery, tackle, apparel and appurtenances, etc., and HAMBURG-SUDAMERIKANISCHE DAMPFSCHIFFAHRTS-GESELLSCHAFT EGGERT & AMSINCK, *Appellees.*	No. 25,368

[July 14, 1971]

Appeal from the United States District Court
for the Western District of Washington
Northern Division

Before: HAMLEY, DUNIWAY and CHOY, Circuit Judges

HAMLEY, Circuit Judge:

Mrs. Edith Loomis, a citizen of Minnesota, brought this action for personal injury damages in federal district court, Western District of Washington, Northern Division. The action was *in rem* against the SS SANTA ROSA, her engines, boilers, machinery, tackle, apparel and appurtenances, and *in personam* against Hamburg-Sudamerikanische Dampfschiffahrts-Gesellschaft Eggert & Amsinck (Hamburg), the owner and operator of the defendant vessel, Bakke Steamship Corporation and Columbus Line.

The cause was tried to the district court without a jury and findings of fact and conclusions of law were entered which we summarize below: Mrs. Loomis entered into a contract of carriage with Hamburg in 1965 for passenger transportation aboard the SS SANTA ROSA from the United States to Australia and return.

When the vessel arrived at Auckland, New Zealand, en route, it moored alongside a dock and a movable gangway was rigged for debarking passengers. On November 15, 1965, while proceeding along the gangway, Mrs. Loomis fell to the dock sustaining serious injury. She required surgery and other medical treatment, was totally disabled for a year, and has a permanent partial disability. The proximate cause of her injuries and damages was the negligent maintenance and unseaworthiness of the gangway. Mrs. Loomis' damages were found by the court to be $25,000.

Mrs. Loomis had obtained the ticket for transportation in September 1965. The copy of the ticket in evidence was not signed by Mrs. Loomis, but the court found that she had read her ticket and fully understood it. In paragraph 13 of the terms and conditions stated in the ticket, it is provided:

> "Notwithstanding any other limitation by law or that the Carrier may be a foreign corporation or non-resident, no suit shall be maintained against it in any jurisdiction nor shall the Carrier be liable, for damages for breach of this contract or for delay, loss or injury to or of any person or property or for death of any person, unless written notice of the claim is presented to the Carrier at its head office in New York City, N.Y., or the office of its agent at the place where the passenger is landed, not later than thirty (30) days after the claim arose and unless also suit is commenced not later than six (6) months after the claim arose; provided that in any case where Section 4283a of the revised statutes of the United States shall apply, the period for giving notice of, or filing claims for loss of life or bodily injury, shall be six (6) months and for the institution of suits on such claims shall be one (1) year, computed from the day when the death or injury occurred. The purchaser of this ticket, and his or her executors, administrators and dependents, agree to indemnify the Carrier from any losses or damages suffered by the Carrier by reason of any suit brought by any person in contravention of the terms of this paragraph."

Section 4283A of the Revised Statutes is codified as 46 U.S.C. § 183b, paragraph (a) of which makes it unlawful for the owner of a sea-going vessel to provide by contract or otherwise a shorter period for the institution of suits for loss of life or bodily injury,

than one year, such period to be computed from the day when the death or injury occurred.

Appellees do not contend that 46 U.S.C. § 183b(a) constitutes a statute of limitations which would be binding upon Mrs. Loomis in the absence of paragraph 13 of the ticket. They do urge that the statute authorized them to specify a one-year time limit for bringing suit, that they did so in paragraph 13, and that Mrs. Loomis did not commence this action within that time limit. This latter assertion is not denied. Mrs. Loomis sustained her injuries on November 15, 1965, and did not file her complaint herein until July 11, 1967.

The court found and concluded that because suit had not been brought within one year from the date of injury, it was barred under the contract provision quoted above. The action was therefore dismissed with prejudice.

On appeal, Mrs. Loomis urges that paragraph 13 of the ticket sold to her is not enforceable in the circumstances of this case. In addition, she argues that the contractual provision in issue is wholly inapplicable to the *in rem* feature of her action, and she should be allowed recovery on this otherwise proven cause even if paragraph 13 barred her *in personam* action.

We turn to a consideration of this second contention. Paragraph 13 states "Notwithstanding any other limitation by law or that the Carrier may be a foreign corporation or non-resident, no suit shall be maintained against it . . ." unless instituted within one year from the date of injury. The paragraph does not expressly apply to proceedings *in rem* against the vessel. For the reasons stated below we are not convinced that the provision should be given an expansive construction which would include *in rem* proceedings.

In THE MONROSA v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959), the Supreme Court had occasion to consider if a term of a bill of lading, which purported to confine jurisdiction of suits for damage to freight to Genoa, Italy, was effective to bar an *in rem* proceeding based on such damage in a federal district court. The clause there in question provided "that no legal proceedings may be brought against the Captain or Shipowners or their Agents . . . except in Genoa . . . ." 359 U.S. at 182. The Fifth Circuit held that the district court erred in declining juris-

diction of the *in rem* feature of the libel and the Supreme Court affirmed the court of appeals ruling. The Supreme Court noted:

> "The initial words are particularly appropriate to a restriction of the clause to *in personam* actions and the rest of the language is intelligible on this premise. In accordance with the familiar rule in such circumstances, we will not stretch the language when the party drafting such a form contract has not included a provision it easily might have." 359 U.S. at 182-183 (footnote omitted).

The Court also noted in THE MONROSA that the contract contained other provisions which included "specific recognition of suits both *in rem* and *in personam*." 359 U.S. at 182 n. *.

Similarly here, the language of the provision in Mrs. Loomis' ticket is appropriate to *in personam* actions. And, as in THE MONROSA, the contract here in issue includes another provision which specifically recognizes suits *in rem* as distinguished from suits *in personam*. Paragraph 24 of the Loomis ticket provides in part that "the Carrier, master *and ship* shall not be liable for any claims" arising out of described circumstances. (Emphasis supplied.) Similar provision could well have been made in paragraph 13, but was not.

Appellees urge that THE MONROSA is inapposite as it dealt with an attempt to foreclose jurisdiction rather than with a time limitation for suit. However, both THE MONROSA and the case at bar involve the interpretation of conditions in form contracts of maritime transportation, and the same limiting interpretation is here urged by Mrs. Loomis as was accepted in THE MONROSA. We think the similarities in the cases outweigh their differences.

Appellees contend that the issue must be governed by the concededly broad approach which the Supreme Court has followed in interpreting the provisions of the act limiting the liability of ship owners, 46 U.S.C. §§ 181-195. However, as said in THE MONROSA, "[i]t is a form contract, not a statute, that we construe here." 359 U.S. at 183.

In *Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11 (2d Cir. 1968), the limiting construction urged by Mrs. Loomis was rejected. The court there held that a time limitation clause which by its terms applied only to the company would be

effective, if otherwise valid, to bar an *in rem* proceeding against the vessel.

The case at bar is distinguishable. The court noted in *Silvestri* that there were no clauses in which the carrier and the ship were separately mentioned. As discussed above, such a clause exists in Mrs. Loomis' contract. In addition, the contract in *Silvestri* contained the following clause:

> "'All the regulations, limitations and exceptions relating to the responsibilities of the Company are understood to apply also to the responsibilities, if any, of its Agents, *its vessels*, its Masters and crew, its employees and, generally, all persons who act for the Company.' (Emphasis supplied.)" *Silvestri*, 388 F.2d at 13.

No such provision is found in the contract here under consideration.[1]

We hold that the contractual provision in question is inapplicable to Mrs. Loomis' *in rem* claim and that it was therefore error to dismiss that claim.

It is unnecessary to reach the other arguments on this appeal as the secured stipulation by the parties to release the vessel from seizure is in an amount double the damages Mrs. Loomis was found to have suffered.

The judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

---

[1]Appellees do not argue that paragraph 1 stating in part that "the relations between Carrier, vessel, and passengers shall be governed by and are subject to all terms stated herein" has a comparable effect.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 7-22-71—380

Appendix B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDITH LOOMIS, *Appellant,* v. SS SANTA ROSA, her engines, boilers, machinery, tackle, apparel and appurtenances, etc, and HAMBURG - SUDANERIKANISCHE DAMPFSCHIFFAHRTS-GESSELLSCHAFT EGGERT & AMSINCK, *Appelles.*	No. 25,368

ORDER

Before: HAMLEY, DUNIWAY and CHOY, Circuit Judges

The opinion in the above-entitled case is amended by deleting the final paragraph and substituting in lieu thereof the following paragraph:

> "The judgment is reversed and the cause is remanded with directions to enter judgment for plaintiff in the amount of twenty-five thousand dollars, with interest thereon from November 20, 1969."

The panel as constituted has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Dated: September 24, 1971

United States Circuit Judges

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-581

SS SANTA ROSA, her engines, boilers, machinery, tackle, apparel and appurtenances, etc.
and
HAMBURG - SUDAMERIKANISCHE DAMPFSCHIFFAHRTS-GESELL-SCHAFT EGGERT & AMSINCK,

Petitioners,

v.

EDITH LOOMIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FRAYN PRINTING COMPANY SEATTLE, WASHINGTON

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-581

SS SANTA ROSA, her engines, boilers, machinery, tackle, apparel and appurtenances, etc. and
HAMBURG - SUDAMERIKANISCHE DAMPFSCHIFFAHRTS-GESELL-SCHAFT EGGERT & AMSINCK,

Petitioners,

v.

EDITH LOOMIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,
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CONTENTS

Page

COUNTER STATEMENT OF THE QUESTION PRESENTED 1

SUPPLEMENTAL STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

There is no Conflict in Decisions of the Court of Appeals 3

The Decision of the Court of Appeals Is Not Inconsistent with Prior Decisions of This Court 4

APPENDIX 1-A

TABLE OF CASES

Page

MAJESTIC, 166 U.S. 375, 17 S.Ct. 597 (1897) 2, 7

MONROSA v. Carbon Black Export, Inc., 254 F.2d 297 (5th Cir. 1958) 359 U.S. 180, 185, 79 S. Ct. 710 (1959) 4, 6, 7

Silvestri v. Italia Societa, etc., 388 F.2d 11 (2d Cir. 1968) 3, 4, 6

STATUTES

R.S. § 4283 A (Title 46, U.S.C. § 183b) 2, 4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. .....

SS SANTA ROSA, her engines, boilers, machinery, tackle, apparel and appurtenances, etc.
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HAMBURG - SUDAMERIKANISCHE DAMPFSCHIFFAHRTS-GESELL-SCHAFT EGGERT & AMSINCK,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Did the Court of Appeals err in holding that Paragraph 13 of the carrier's passenger ticket form providing a limitation period of one year for institution of suits against the carrier (Columbus Line, Inc.) did not preclude an action *in rem* against vessel SANTA ROSA by a passenger to recover damages for personal injury, instituted approximately twenty months after the injury?

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioners' Statement of the case is correct, as far as it goes.

The opinion of the Court of Appeals for the Ninth Circuit appears at 447 F.2d 105 (1971).

Attached hereto as Appendix 1 is a true copy of the ticket which petitioner urges as precluding actions *in rem* against the SANTA ROSA unless instituted within one year. (Trial Exhibit, Defendants' A-1). It is to be noted that, rather than "incorporating" R.S. § 4283A, as claimed by Petitioner, Paragraph 13 of the *Loomis* text merely cites the statute in an attempt to avoid its operation wherever possible.

Petitioners also omit to set forth that notice of the accident and claim was given to the carrier's agents by letter of November 29, 1965 (2 weeks after the injury) (Trial Exhibit A-2); that a demand was made upon petitioners' San Francisco attorneys under date of July 1, 1966 (Tr. 71-73); and that petitioners' representatives never notified respondent, or her counsel, that it was claimed an action would be barred, either against the carrier *in personam,* or against the vessel *in rem,* until after the institution of the present action *in rem* and *in personam,* in July, 1967.

Respondent also urged in the Court below, that the limitation of time for suit against the carrier *in personam* was not enforceable in the circumstances of this case, because Paragraph 13 was not effectively incorporated into the contract of carriage, and the purported limitation was neither "distinctly declared" nor "deliberately accepted" within the meaning of *THE MAJESTIC*, 166 U.S. 375, 17 S.Ct. 597 (1897). Reversing upon the other ground, the Court of Appeals did not reach this latter contention. If certiorari is granted, and the holding of the Court below is reversed, the case should be remanded for further consideration of this issue.

REASONS FOR DENYING THE WRIT

There Is No Conflict In Decisions of the Court of Appeal

The decision of the Court below is not in conflict with the decision of the Court of Appeals for the Second Circuit in *Silvestri v. Italia Societa, etc.*, 388 F.2d 11 (2d Cir. 1968).

For all purposes relevant to this Petition Article 30[1] of the *Silvestri* ticket is the equivalent of Paragraph 13 of the *Loomis* ticket, i.e., the clause itself makes the time limitation provided therein applicable only to actions against "the Company" (Silvestri) or "the carrier" (Loomis).

In *Silvestri,* however, Article 32 of the ticket further provided as follows:

> "All the regulations, limitations and exceptions relating to the responsibility of the Company are understood to apply also to the responsibilities, if any, of its Agents, *its vessels,* its Masters and crew, its employees and, generally, all persons who act for the Company." (Emphasis supplied.)

Construing Article 30 with Article 32 of the *Silvestri* ticket, the Court of Appeals for the Second Circuit held that the limitation of time for suit against the Company, was extended by the contract to apply also to suit against the vessel *in rem.*

Petitioners urged the *Silvestri* decision upon the Court of Appeals for the Ninth Circuit in the case. The Court below held the *Silvestri* ticket distinguishable on two grounds:

1. The *Loomis* ticket contains no provision comparable to Article 32 of the *Silvestri* ticket.

2. Unlike the *Silvestri* ticket, the *Loomis* ticket

---

1. Both provisions of the *Silvestri* ticket are set forth in the opinion of the Court of Appeals for the Second Circuit, 388 F.2d 11, (at p. 12 and p. 13 respectively).

contained other provisions (See Paragraph 24 of Ex. 1) evidencing an intent to extend other specific immunities or limitations (but not the time for suit provision) to the vessel as well as the Carrier. In this respect the Court of Appeals for the Ninth Circuit found *The MONROSA v. Carbon Black Export, Inc.*, 254 F.2d 297 (5th Cir. 1958) 359 U.S. 180, 79 S. Ct. 710 (1959) (discussed later in this Brief) the controlling authority.

There is no conflict between the decision of the Court of Appeals for the Ninth Circuit in this case, and that of the Court of Appeals for the Second Circuit in the *Silvestri* case. The Court below considered that *Silvestri* decision and found it distinguishable on the grounds specified above.

The Decision of the Court of Appeals Is Not Inconsistent with Prior Decisions of This Court

The inconsistency claimed by Petitioner is between the decision below, which involved construction of a contract, and decisions of this Court which construed a statute.

The only issue presented by this Petition is whether this Court should review the decision of the Court below, construing the provisions of a contract, i.e., a steamship passenger ticket.

No issue is presented as to the construction of a statute.

R.S. § 4283A (Title 46 U.S.C. § 183b) provides in pertinent part as follows:

> "Stipulations limiting time for filing claims and commencing suit.
>
> (a) It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels and their tenders) transporting passengers or merchandise

or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period for institution of suits to be computed from the date when the death or injury occurred.

(b) Failure to give such notice, where lawfully prescribed in such contract, shall not bar any such claim—

(1) If the owner or master of the vessel or his agent had knowledge of the injury, damage, or loss and the court determines that the owner has not been prejudiced by the failure to give such notice; nor

(2) If the court excuses such failure on the ground that for some satisfactory reason such notice could not be given; nor

(3) Unless objection to such failure is raised by the owner."

Clearly, the office of the statute is to invalidate unreasonable contractual stipulations limiting the time for filing of claims or the commencement of suit.

As the Court of Appeals notes in its opinion, the respondents did not contend below that R.S. § 4283A was a statute of limitations binding on a passenger in the absence of an appropriate contractual provision. (447 F2d. 105 at 107).

The Court below pointed out that Paragraph 13 of the Loomis ticket "does not expressly apply to proceedings *in rem* against the vessel," (447 F2d. at 107). The Court went on to state:

> ". . . [i]t is a form contract, not a statute, that we construe here." 447 F2d at 108.

We submit there is no dispute as to the interpretation of the statute. Construed broadly, it permits

a carrier to provide by contract for extension of limitations and immunities, such as the limitation of time for suit, to the vessel, as well as the carrier itself.

Here, the carrier failed to do so.

In construing the Loomis ticket as not precluding actions *in rem* against the vessel commenced more than one year after the injury, the Court of Appeals for the Ninth Circuit reached a result fully consistent with the decision of the Court of Appeals for the Second Circuit in *Silvestri* (involving a contract different in two material respects).

Moreover, the Court of Appeals reached the only decisions consistent with the holding of this Court in *The MONROSA v. Carbon Black Export, Inc.*, 359 U.S. 185, 79 S.Ct. 710 (1959). In that case, the shipper of cargo brought suit in District Court in Texas to recover for cargo damage against the vessel *in rem* and against the carrier *in personam*. Relying on a provision of the bill or lading providing that ". . . no legal proceedings may be brought against the Captain or ship owners or their agents . . . except in Genoa . . ." the District granted a motion to decline jurisdiction.

The shipper appealed, and the Court of Appeals for the Fifth Circuit reversed holding that the quoted language did not preclude actions against the vessel *in rem* in jurisdictions other than Genoa. This Court granted certiorari. Its opinion states in part as follows (359 U.S. 180 at 182-3, 79 S. Ct. 710 at 712-3):

> "We find ourselves in agreement with the views of the Court of Appeals below that this clause should not be read as limiting the maintenance of an action *in rem*, cf. *The Maggie Hammond*, 9 Wall. 435, 449-450. 19 L. Ed. 772, against the vessel to enforce a maritime lien for

proper carriage. The initial words are particularly appropriate to a restriction of the clause to *in personam* actions, and the rest of the language is intelligible on this premise. In accordance with the familiar rule in such circumstances, we will not stretch the language when the party drafting such a form contract has not included a provision it easily might have . . .

"Accordingly, after oral argument, we have concluded that the Court of Appeals was correct in holding that the libel *in rem* was properly maintainable."

In so holding, this Court cited its own opinion in *The MAJESTIC*, 166 U.S. 375, 17 S.Ct. 597 (1897), construing a passenger ticket, in which the Court stated (166 U.S. at 386):

"We quite agree . . . that 'when a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted'."

The construction of the Loomis ticket (App. 1 to this Brief) is the only construction permissable under the decisions of this Court in *The MAJESTIC*, and *The MONROSA v. Carbon Black Export, Inc.*, *supra*.

Respectfully submitted,
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1-A

PRINCIPALS:
HAMBURG - SUEDAMERIKANISCHE DAMPFSCHIFFFAHRTS - GESELLSCHAFT EGGERT & AMSINCK

Columbus Line, Inc.

1st Copy for Carrier

Nº 3202

APPENDIX 1

CONTRACT TICKET
(not transferable)

Vessel MS SANTA ROSA Voy. No. 18 SB

Expected Time of Departure October 19th 1965

From Los Angeles (San Pedro, Outer Harbor) To Sydney

Agent at Port of Embarkation Bakke Steamship Corporation, 520 W Seventh Street Los Angeles Phone: MAdison 7-9621

Agent at Port of Destination Amtraco Travel Centre, 17/19 Bridge Street - Sydney

Names of Passengers	Sex	Age	Cabin	Berth	Ocean Fare	Taxes
1 MRS. EDITH B. LOOMIS	F	66	B	A	$ 600.00	
2 less 10% r/t reduction in conjunction with					$ 60.00	
3 Columbus Line open ticket No. 5021 Brisbane/Los Angeles					$	
4					$	
Funds paid in for drinks, etc. on board ship $				Total	$ 540.00	

Total amount received $

For the carrier

BAKKE STEAMSHIP CORPORATION (Stamp)
As Agents Only
Signature and Stamp

San Francisco, California
Issued at

September 27, 1965
Date

Passengers

Signature

Signature

Signature

Signature

TERMS AND CONDITIONS

1. It is agreed between the Carrier and passengers that whether or not this contract has been signed by or on behalf of them or any of them, the transportation provided for under this contract and the relations between Carrier, vessel and passengers shall be governed by and are subject to all terms stated herein. The person signing this contract covenants and warrants that he is duly authorized by or on behalf of all the passengers mentioned in this contract to agree to all the terms hereof and the passengers using this ticket agree that the signatures contained herein shall have the same force and effect as though each and everyone of them also signed this contract. On this understanding should the Carrier confirm the signature, number of all persons other than the undersigned, in duly executed printed vessels shall include singular and vice versa, and each female and vice versa.

(Continued Overpage)

354 Sam 8-63 JMcO Co.

(Continued on page 3)

BEST AVAILABLE COPY